INDEX

	Page No.
Opinion below	1
Jurisdiction	1
Questions presented	2
Statute involved	2
Statement	2
Argument	5
Conclusion	7

CITATIONS

Cases:

Aplin v. *United States*, 41 F. 2d 495	5
Brown v. *United States*, 152 F. 2d 138	7
Christian v. *United States*, 8 F. 2d 732	6
Delaney v. *United States*, 263 U. S. 586	6
Gantz v. *United States*, 127 F. 2d 498, certiorari denied, 317 U. S. 625	7
Ghadiali v. *United States*, 17 F. 2d 236, certiorari denied, 274 U. S. 747	5
Glasser v. *United States*, 315 U. S. 60	5
Lewis v. *United States*, 11 F. 2d 745	7
Neff v. *United States*, 105 F. 2d 688	5
Robertson v. *United States*, 171 F. 2d 345	7
United States v. *Johnson*, 319 U. S. 503	6
United States v. *Picarelli*, 148 F. 2d 997, certiorari denied, 326 U. S. 722	6
United States v. *Reginelli*, 133 F. 2d 595, certiorari denied, 318 U. S. 783	5

Statute involved:

18 U.S.C. 472	2

In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 449

JOHN MICHAEL PETRONE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINON BELOW

The opinion of the Court of Appeals (R. 34-37) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on November 20, 1950 (R. 37). The petition for a writ of certiorari was filed on December 11, 1950. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F.R. Crim. P.

QUESTIONS PRESENTED

1. Whether the evidence is sufficient to support petitioner's conviction of possessing counterfeit bills.

2. Whether the trial court's refusal to permit a Government witness on cross-examination to answer a question posed by petitioner's counsel constituted reversible error.

STATUTE INVOLVED

The pertinent statute [18 U.S.C. 472] provides:

> Whoever, with intent to defraud, passes, utters, publishes, or sells, or attempts to pass, utter, publish, or sell, or with like intent brings into the United States or keeps in possession or conceals any falsely made, forged, counterfeited, or altered obligation or other security of the United States, shall be fined not more than $5,000 or imprisoned not more than fifteen years, or both.

STATEMENT

After freely and voluntarily waiving a jury trial (R. 3-4), petitioner was convicted (R. 30) of unlawful possession of approximately 500 counterfeit ten dollar Federal Reserve Bank notes, in violation of 18 U.S.C. 472 (R. 2), and sentenced to fifteen years' imprisonment and to pay a fine of $5,000.

The Government's uncontroverted evidence may be summarized as follows:

About 8:00 a.m. on March 24, 1950, three special agents of the Federal Bureau of Investigation (R.

4, 11, 19, 24), in executing a warrant of arrest charging petitioner with receiving jewelry stolen from interstate commerce, arrested him on the first floor of his three-story home located in the Bronx, immediately after he permitted them to enter (R. 4-5, 9-11, 19, 24, 25). One of the agents, in order to permit petitioner to change to his street clothes, accompanied him to his bedroom on the third floor which, in addition, contained a bedroom where petitioner's son was sleeping and an unoccupied bedroom which contained some clothes of petitioner and his son (R. 5, 7, 11, 12, 14). While petitioner was dressing and with petitioner's consent, after the agent advised him that he could search the house as an incident to the arrest, the agent, in the presence of petitioner and his wife, searched petitioner's bedroom, the third floor hall and the unoccupied bedroom, where he observed 510 counterfeit ten dollar Federal Reserve Bank notes lying on top of a dresser (R. 5-7, 13, 14, 15-16, 20, 25).

The agent picked up the notes and asked petitioner "What is this?" Petitioner said, "I don't know what it is," but when asked if it was counterfeit, he replied affirmatively and then inquired "Cannot we do something about this?" When the agent indicated disinterest in such a proposition and requested the other two agents to come upstairs, petitioner became quite excited, indicated complete disgust that the notes were found in his

possession, commented, "Oh, I am ruined," that judging from the newspaper articles, counterfeiting was a serious offense, that "essentially" counterfeiting was not his "line," that he had never seen any counterfeit notes that looked any better, that he was sorry for bringing "this shame" upon his wife, that he was "very unhappy about getting mixed up in this" and that he was going to kill himself; and he then repeated his earlier offer to the agents to "do something about" it. (R. 8, 16-18, 20-21, 22, 23, 24, 25.) When advised that the house was searched initially for a pair of earrings, petitioner said, "My goodness, if I had the earrings I would certainly be glad to give them to you. If you only had not found this [notes]" (R. 21). One of the agents inquired as to what petitioner had planned to do with the currency. Petitioner did not answer and then when asked if he intended to burn it, he smiled at that and said "no, he did not intend to burn it, but he was not going to pass it in New York." When asked "if he was going to pass it in Canada * * * he said no. And then he made a comment about that rat bringing the stuff last night" (R. 8-9, 22, 26), whom he refused to identify, saying that he was not a stoolpigeon (R. 9). One of the agents testified that petitioner remarked that he had just brought the counterfeit notes home the previous night (R. 21).

Petitioner introduced no evidence on his behalf.

After the Government rested, he moved to dismiss the indictment and later, after the verdict, moved for a judgment of acquittal on the ground that the Government had failed to prove its case. Both motions were denied. (R. 29-32.)

ARGUMENT

1. Petitioner contends that the evidence is insufficient to sustain his conviction (Pet. 8-12). He argues that each element of the crime, principally the intent to defraud required under the statute, was not shown by "definite, positive, unequivocal evidence of some overt act or undisputed admission" (Pet. 9), but was shown only by inferences from circumstances which, he further argues, cannot be "substituted for facts" (Pet. 9). Manifestly, however, the intent element may be, and in most instances necessarily must be, established by circumstantial evidence. *Ghadiali* v. *United States,* 17 F. 2d 236, 237-238 (C.A. 9), certiorari denied, 274 U.S. 747; *United States* v. *Reginelli,* 133 F. 2d 595, 598 (C.A. 3), certiorari denied, 318 U.S. 783; *Neff* v. *United States,* 105 F. 2d 688, 691 (C.A. 8); *Aplin* v. *United States,* 41 F. 2d 495, 496 (C.A. 9). We submit that, viewing the evidence and the inferences to be drawn therefrom in the light most favorable to the Government (*Glasser* v. *United States,* 315 U.S. 60, 80), petitioner's contention is untenable.

The court below analyzed the evidence in detail (R. 34-36) and we shall not repeat that analysis

here. It is clear that the uncontroverted evidence of the circumstances where the currency here involved was found, petitioner's statements to the F.B.I. agents which evidenced his consciousness of guilt (*United States* v. *Picarelli,* 148 F. 2d 997 (C.A. 2), certiorari denied, 326 U.S. 722; *Christian* v. *United States,* 8 F. 2d 732, 733 (C.A. 5)), and the absence of an innocent explanation by him, either at the time the money was discovered or at the time of trial, all point to "no other [possible] conclusion", as the court below stated (R. 36), except guilt. Accordingly, we submit that the evidence here justified the court's finding of guilt [illegible] and no sufficient reason appears why the concurrence of the district judge [illegible] and the Court of Appeals as to the sufficiency of the evidence should not be accepted as final. *United States* v. *Johnson,* 319 U.S. 503, 518; *Delaney* v. *United States,* 263 U.S. 586, 589-590. None of the decisions cited by petitioner (Pet. 8-12) supports his repeated assertion of a conflict of decisions.

2. Petitioner complains (Pet. 12-13) that the trial court erred in refusing to permit one of the F.B.I. agents on cross-examination to answer the following question: "He [petitioner] gave you the impression, didn't he, that he did not know these bills were in that room? Isn't that the impression he gave you?" But, as the Court of Appeals pointed out (R. 36-37), such matters are within the discretion of the trial court. Furthermore,

the question called for a conclusion of fact and, as the court also pointed out, was therefore improper under some decisions, but with which it did not agree (R. 36) (*Lewis* v. *United States,* 11 F. 2d 745, 747 (C.A. 6)). Assuming, *arguendo,* that such a question is proper in some cases, here it called for a conclusion as to petitioner's state of mind, which obviously was not a matter within the personal knowledge of the witness of whom the question was asked and accordingly not one on which he could testify. Cf. *Robertson* v. *United States,* 171 F. 2d 345, 346 (C.A.D.C.); *Brown* v. *United States,* 152 F. 2d 138, 139 (C.A.D.C.); *Gantz* v. *United States,* 127 F. 2d 498, 504, certiorari denied, 317 U.S. 625.

CONCLUSION

The decision below is correct and the case presents no conflict of decisions or question of general importance. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

PHILIP B. PERLMAN,
Solicitor General.
JAMES M. MCINERNEY,
Assistant Attorney General.
ROBERT S. ERDAHL,
FELICIA H. DUBROVSKY,
Attorneys.

JANUARY 1951.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1951 923739 492